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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

THE STATE OF COLORADO,
Petitioner,

vs.

ANTONIO GUADALUPE NUNEZ,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF COLORADO

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

When both the defendant and the trial court concede during a hearing on a motion to suppress that the credibility of the affiant to a search warrant's affidavit is not at issue, is the trial court's order requiring the prosecution to reveal a confidential informant's identity beyond the scope of the Fourth Amendment?

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JURISDICTIONAL STATEMENT

After the trial court suppressed certain evidence in this case, the prosecution filed an Interlocutory Appeal in the Colorado Supreme Court pursuant to C.A.R. 4.1. On February 22, 1983, that Court affirmed the trial court's decision and issued its remittitur. (Appendix 1). Because the State may not request a rehearing of issues decided in an Interlocutory Appeal (Appendix 35), the prosecution filed a motion to recall and to stay the remittitur on February 25, 1983. (Appendix 25). The Colorado Supreme Court denied that request on February 28, 1983. (Appendix 28). The government then asked the trial court to stay any further proceedings in this case pending this Court's review. (Appendix 30). The trial judge granted that request on March 9, 1983. Based upon 28

U.S.C.A. Sec. 1257(3), this Court has jurisdiction to resolve the issue presented in this case.

In Delaware v. Prouse, 440 U.S. 648 (1979), the Delaware Supreme Court relied upon both the federal and that State's constitutions in its ruling. Although the prosecution argued that the State court's references to the State constitution deprived this Court of jurisdiction, Justice White wrote that this Court could review the Delaware Court's decision because that court had historically discussed both constitutions together and had apparently interpreted them to have the same scope. Because the Delaware Supreme Court analyzed its own constitution in light of this Court's decisions, Justice White stated that the United States Supreme Court had jurisdiction to hear that case.

This Court has adopted a similar analysis in at least two cases decided after Prouse. In Oregon v. Kennedy, 72 L.Ed.2d 416 (U.S. Sup. Ct. 1982), this Court decided a case in which the merits involved both state and federal grounds. The majority held that this Court had jurisdiction to resolve that case because the Oregon Supreme Court had relied heavily upon its prior decisions that interpreted the United States Constitution.

In South Dakota v. Neville, 74 L.Ed.2d 748 (U.S. Sup. Ct. 1983), Justice O'Connor wrote that this Court would decide a case in which the South Dakota Supreme Court referred to both the federal and State constitutions. The Neville majority held that the State Supreme Court had first found that a statute had abridged the Fifth Amendment

privilege against self-incrimination before it held that the same statute also offended South Dakota's Constitution. While the State grounds may have been adequate, Justice O'Connor wrote that those grounds were not independent. As in Prouse, the cases upon which the South Dakota Court relied in its opinion analyzed the United States Constitution.

The Colorado Supreme Court's decision in this case was based upon its interpretation of the United States Constitution, not upon independent and adequate State grounds. As in Kennedy and Neville, the Colorado Supreme Court has historically relied upon this Court's decisions that involve federal constitutional principles. The following Colorado cases, which all involve the issue of whether a court should order the prosecution to disclose the identity of

an informant, rely, in whole or in part, upon this Court's decisions in either Roviaro v. United States, 353 U.S. 53 (1957), McCray v. Illinois, 386 U.S. 300 (1967) or Franks v. Delaware, 438 U.S. 154 (1978): Whaley v. People, 171 Colo. 287, 466 P.2d 927 (1970); McNulty v. People, 174 Colo. 494, 483 P.2d 946 (1971); People v. Glaubman, 175 Colo. 41, 485 P.2d 711 (1971); Parlapiano v. District Court, 177 Colo. 36, 496 P.2d 626 (1972); DeLaCruz v. People, 177 Colo. 46, 492 P.2d 627 (1972); People v. Quintana, 183 Colo. 81, 514 P.2d 1325 (1973); People v. Brown, 185 Colo. 272, 523 P.2d 986 (1974); People v. Musgrave, 187 Colo. 135, 529 P.2d 313 (1974); People v. Marquez, 190 Colo. 255, 546 P.2d 482 (1976); People v. Langford, 191 Colo. 87, 550 P.2d 329 (1976); People v.

Mulligan, 193 Colo. 509, 568 P.2d 449 (1977); People v. Korte, 198 Colo. 474, 602 P.2d 2 (1979); People v. Del Alamo, 624 P.2d 1304 (Colo. 1982); People v. Dailey, 639 P.2d 1068 (Colo. 1982); People v. Bueno, 646 P.2d 931 (Colo. 1982); People v. Martinez, 658 P.2d 260 (Colo. 1983); People v. McLean, 81SC269 (Colo. March 28, 1983).

In the case at bar, the Colorado Supreme Court relied upon People v. Dailey, supra, People v. Bueno, supra, and People v. Martinez, supra. Those three cases each refer to and rely upon some of the prior Colorado decisions that are listed above. Clearly, each of those three decisions is predicated upon a line of cases that was resolved by the Colorado Supreme Court's interpretation of the Fourth Amendment and by its reference to, and reliance upon, this

Court's opinions in Roviaro, McCray and Franks.

In Dailey, the Colorado Court adopted Franks. That Court also referred at 1074 and 1075 to the Colorado Constitution. However, as in Neville, those references were made only after the Colorado Court had resolved the issues under the United States Constitution and this Court's decisions. In fact, when the Colorado Supreme Court discussed the scope of remedies that a court could impose if it discovered certain defects in a search warrant's affidavit, Justice Lohr wrote at 1075:

> We consider it inadvisable to attempt to develop consequences which would follow under the United States and Colorado Constitutions from each of the various possibilities as to the origin of the error. [Emphasis supplied].

While the Dailey court referred to the Colorado Constitution when it discussed the burden that an accused must meet at a "veracity hearing" and when it referred to possible defects in an affidavit that were developed at such a hearing, when the Colorado Supreme Court discussed the factors that a trial judge should consider in deciding whether to order the prosecution to reveal an informant's identity, the Colorado Court relied exclusively upon decisions that involved the United States Constitution. In fact, Justice Lohr wrote at 1077 that Colorado has "adopted the same test" to determine if disclosure is appropriate that this Court established in Roviaro. Clearly, any state constitutional grounds that could support the Colorado Supreme Court's decision in this case are neither independent of the federal grounds, nor

were they applied at all to the question of when disclosure of the informants identity is appropriate. This Court, therefore, has jurisdiction to resolve the issue raised in this case.

STATEMENT OF THE CASE

On November 7, 1981, pursuant to a warrant, Denver Police Officers and Adams County Sheriff's Deputies searched a house located at 8690 Norwich Street, unincorporated Adams County, Colorado. During this search, these officers searched the person of the defendant, Antonio Nunez. The officers discovered fifteen balloons in Mr. Nunez's pocket, which contained a substance later analyzed to be heroin. Based upon this evidence, the prosecution charged the defendant with Possession of a Schedule I Controlled Substance, contrary to C.R.S.

1973, §12-22-309, as amended, and C.R.S. 1973, §18-18-105(2)(a), as amended.

Through counsel, Mr. Nunez filed a motion to suppress the heroin seized from him and a motion requesting that the trial court order the prosecution to disclose the name of a confidential informant upon whose statements the search warrant executed on November 7, 1981, was partially based. (Appendix 11, 15). On September 9, 1982, the District Court held a hearing on those motions. The affidavit for the warrant was introduced at the hearing. It contained information provided by three separate confidential informants. Defense counsel stated that he only sought the disclosure of one informant, alleging that only that person's credibility was an issue.

The affiant, Denver Police Sergeant

Don DeNovellis, had written that the informant in question had told Sergeant DeNovellis that the informant had seen the defendant with a "large amount of heroin" within twenty-four hours of November 7, 1981. The informant said that the defendant had stated that he had just returned from Mexico, where he had purchased five ounces of heroin. The informant watched the defendant dilute the heroin and then package it in balloons. Sergeant DeNovellis wrote that the informant recognized heroin because he/she had previously used it. Sergeant DeNovellis also noted that the informant had previously provided him with reliable information that had led to seizures of heroin.

Defense counsel conceded that the credibility of the affiant, Sergeant DeNovellis, was not at issue. Instead,

he questioned the informant's veracity. He argued that the informant's identity should be revealed so that he could subpoena the informant to testify at the suppression hearing.

The defendant testified in order to support his attorney's allegations. The defendant stated that on October 31, 1981, he had driven his motorhome from his house on Norwich Street to the mountains in order to hunt. He said he was accompanied by his father, his son, his nephew and a friend. The defendant stated that he had returned from his trip in the early morning hours of November 6, 1981. While he spent all of that day at the Norwich Street address, he insisted that no one visited his home except for his immediate family and at least eight other relatives. He denied that he had travelled to Mexico between October 31

and November 6. He also stated that he did not know what heroin was. The defense did not present the testimony of any of the people who allegedly went hunting with the defendant or of anyone who had been at his home on November 6, 1981.

The prosecution argued that the trial court should not order the police to disclose the informant's identity. First, the prosecutor mentioned that disclosure of the informant's identity could endanger that person's safety. Second, he pointed out that defense counsel was not questioning the affiant's credibility, but rather the credibility of the informant. Third, he observed that the prosecution would not use the informant as a witness at trial because the informant was not a witness to the incident upon which the charge was based.

Fourth, he submitted that there was no disagreement between the informant's statement and the defendant's testimony. He concluded by stating that defense counsel had not established that disclosure of the informant's identity would be essential to the motion to suppress.

After hearing arguments of both counsel, the trial court found that disclosure of the informant's identity was necessary to resolve the motion to suppress and ordered the prosecution to reveal the informer's name. The prosecutor subsequently informed the court that he would not disclose the informant's identity because he was concerned for his/her safety. On October 7, 1982, the trial court, in a written opinion (Appendix 18), found that disclosure of the informant was essential

to the resolution of the case. Because the prosecution refused to disclose the informant's identity, the trial court suppressed the evidence taken from the defendant in the search that occurred on November 7, 1981. (Appendix 23). Pursuant to C.A.R. 4.1, the prosecution then took an Interlocutory Appeal to the Colorado Supreme Court.

ARGUMENT

THE COLORADO SUPREME COURT'S DECISION IN THIS CASE INCORRECTLY EXTENDS THIS COURT'S DECISIONS THAT INVOLVE CONFIDENTIAL INFORMANTS BEYOND THE SCOPE OF STATE ACTION AND PERMITS AN ACCUSED TO OBTAIN THE IDENTITY OF A CONFIDENTIAL INFORMANT BY PRESENTING ANY EVIDENCE AT ALL.

In Roviaro v. United States, 353 U.S. 53 (1957), this Court recognized and approved of an "informer's privilege."

Justice Burton described the rationale for that privilege at 59:

> The purpose of the privilege is the furtherance and the protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law enforcement officials, and by preserving their anonymity, encourages them to perform that obligation.

However, this Court recognized that this privilege is not absolute. If a trial court finds that disclosure of an informer's name would be helpful to an accused's defense or if disclosure were necessary to the just resolution of a case, then that court could order the State to relinquish the informer's identity.

While, in the appropriate case, justice demands that an accused discover

the name of his accuser, this Court has indicated that trial judges should not treat the "informer's privilege" lightly. In Roviaro at 645, footnote 9, this Court quoted, with approval, Scher v. United States, 305 U.S. 251 (1938):

> [P]ublic policy forbids disclosure of an informer's identity unless essential to the defense, as, for example, where this turns upon an officer's good faith. [Emphasis supplied].

Scher indicates that unless there is a proper demonstration by an accused that he needs to know who the informant was in order to prepare his case, a court cannot order the prosecution to reveal the informer's name.

A defendant's request to learn an informant's identity normally arises in two situations. First, an informant may have been a participant in or a witness

to the event upon which a criminal charge has been based. In that factual framework, courts frequently order the State to tell the accused the informer's name because the informer may possess exculpatory evidence. The issue presented, therefore, is one of guilt or innocence. The case at bar does not involve this situation.

Second, an informant may have provided the police with information that, either alone or when combined with other facts, establishes probable cause for the police to arrest someone or to search that person's house or possessions. If this information is incorporated into an affidavit for a search warrant, it must satisfy the two pronged test that this Court established in Aguilar v. Texas, 378 U.S. 108 (1964)

and Spinelli v. United States, 393 U.S. 410 (1969). Of course, the purpose of the Aguilar-Spinelli test is to require the police-affiant to include enough reliable information in the affidavit to assure a reviewing magistrate that the police are not inventing "facts" so that they can obtain judicial approval to search a suspects home and thereby unjustifiably invade his Fourth Amendment rights.

However, the Aguilar-Spinelli test did not resolve the question of whether an accused could discover the name of the informant who supplied information included in a search warrant's affidavit. In McCray v. Illinois, 386 U.S. 300 (1967), an accused sought the name of an informant who had provided a police officer with information that led to the accused's warrantless arrest. In

upholding the trial judge's decision to deny that request, this Court recognized that when a defendant at a suppression hearing seeks the name of an informant who provided information to the police that led to the seizure of evidence from him, he seeks to avoid his guilt.

This Court recognized in McCray that the purpose of the suppression hearing that involves a confidential informant is to determine if the police have violated the Fourth Amendment. Justice Stewart, quoting New Jersey's Chief Justice Weintraub, underscored this position at 307-308:

> [T]he magistrate is concerned, not with whether the informant lied, but with whether the affiant is truthful in his recitation of what he was told. If the magistrate doubts the credibility of the affiant, he may require that the informant be identified or even produced. [Emphasis supplied].

In Franks v. Delaware, 438 U.S. 154 (1978), this Court held that an accused, at a motion to suppress, could attack the veracity of the affiant to a search warrant's affidavit. Justice Blackmun wrote that the purpose of this "veracity attack" was to assure that the police did not mislead a reviewing magistrate and to protect the Fourth Amendment rights of citizens. When combined with Aguilar-Spinelli, Franks provides an opportunity for both courts and defendants to assure themselves that police-affiants have told the truth in their affidavits.

While Franks at 170 left open the issue of whether an informant's identity should be disclosed after an accused has made a proper demonstration that there were falsehoods in an affidavit, this Court clearly set out what the

fundamental elements of that demonstration must be. Justice Blackmun described those components at 171:

> There is, of course, a presumption of validty with respect to the affidavit supporting the search warrant. To mandate an evidentiary hearing, the challengers attack must be more than conclusory and must be supported by more than a mere desire to cross examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof....Allegations of negligence or innocent mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted today is only of the affiant, not of any nongovernmental informant. [Emphasis supplied].

This Court's position that a veracity attack only involves a police-affiant's, not an informant's, credibility, has been echoed in state and federal courts in cases that have been

decided both before and after Franks. United States v. Edwards, 602 F.2d 458 (C.A. 1 1979); United States v. Barnes, 604 F.2d 121 (C.A. 2 1979); United States v. Metz, 608 F.2d 147, (C.A. 5 1979); United States v. Carmichael, 489 F.2d 983 (C.A. 7 1973); United States v. Skramstad, 649 F.2d 1259 (C.A. 8 1981); United States v. Chesher, 678 F.2d 1353 (C.A. 9 1982); United States v. Schauble, 647 F.2d 113 (C.A. 10 1981); United States v. Weingarten, 485 F.Supp. 1167 (D.C.N.J. 1979); United States v. Burke, 490 F.Supp. 855 (D.C.Fla. 1980); United States v. Dorfmann, 542 F.Supp. 345 (D.C.Ill. 1982); Thornton v. State, 390 So.2d 1093 (Ala.Cr.App. 1980), cert. den. 450 U.S. 998 (1980); Schmid v. State, 615 P.2d 565 (Alaska 1980); State v. Keener, 110 Ariz. 462, 520 P.2d 510 (1974); Theodor v. Superior Court, 104 Cal.Rptr.

226, 501 P.2d 234 (1972); People v. Brumfield, 55 Ill.Dec. 687, 426 N.E.2d 1012 (1981); State v. Boyd, 224 N.W.2d 609 (Ia. 1974); State v. Hemerding, 5 Kan.App. 797, 626 P.2d 210 (1981); State v. Babbit, 363 So.2d 690 (La. 1978); State v. Chase, 439 A.2d 526 (Me. 1982); Commonwealth v. Brown, 429 N.E.2d 47 (Mass.App. 1981); People v. Johnson, 83 Mich.App. 1, 268 N.W.2d 259 (1978); State v. Luciow, 308 Minn. 6, 240 N.W.2d 833 (1976); State v. Boyd, 492 S.W.2d 787 (Mo. 1973), cert. den. 414 U.S. 1069 (1973); State v. Butler, 207 Neb. 760, 301 N.W.2d 332 (1981); State v. Spero, 117 N.H. 199, 371 A.2d 1155 (1977); State v. Burnett, 42 N.J. 377, 201 A.2d 39 (1965); State v. Cervantes, 92 N.M. 643, 593 P.2d 648 (1979); People v. Alfinito, 264 N.Y.S. 243, 211 N.E.2d 644 (1965); Commonwealth v. Bradshaw, 434

A.2d 181 (Pa.Super. 1981); State v. Brown, 618 S.W.2d 365 (Tenn.Cr.App. 1981); Laque v. State, 627 S.W.2d 781 (Tex.App. 1982); State v. Larson, 26 Wash.App. 564, 613 P.2d 542 (1980). Aside from Colorado, research has not revealed any jurisdiction that permits an accused to attack only an informant's credibility at a veracity hearing and then to ask a trial court to order the prosecution to disclose the informant's identity.

There are at least two reasons why this Court in McCray and Franks limited the situations in which an accused could successfully request and obtain an informer's name. First, if a veracity attack is not limited to the affiant, an accused will frequently present unverifiable evidence that the informant has lied. As this Court recognized in

McCray, at 306:

> If a defendant may insist upon disclosure of the informant in order to test the truth of the officer's statement that there is an informant or as to what the informant related or as to the informant's reliability, we can be sure that every defendant will demand disclosure He has nothing to lose and the prize may be the suppression of damaging evidence if the State cannot afford to reveal its source, as is so often the case. And since there is no way to test the good faith of a defendant who presses the demand, we must assume the routine demand would have to be routinely granted.

The case at bar presents exactly the scenario that this Court feared and predicted in McCray. Armed with an affidavit that complied with the Aguilar-Spinelli test, the police searched the defendant's home and person and took from him fifteen balloons that contained heroin. Clearly, the informant had not only been proved reliable in the

affidavit, but the subsequent search by the police further corroborated the informant's reliability when they discovered heroin, contained in balloons, on the defendant's person. Yet, at the motion to suppress, the defendant said that the informant could not have seen what the informant stated that he or she saw. The defendant then testified that he did not know what heroin was, although the police had taken a large amount of it from his own pocket.

The danger of not limiting a veracity challenge to the affiant's credibility is clear. If an accused can attack an informant's statements, then only the human imagination can limit the testimony about the informant that the accused could present. Because, unlike an officer-affiant, an informer is not

available for consultation or testimony during a suppression hearing, it would be difficult, if not impossible, to refute even the wildest defense allegations. In this situation, as McCray points out, trial judges would have little choice but to order the prosecution to reveal the informer's name. This result would eviscerate the "informer's privilege."

Second, the Fourth Amendment, and the exclusionary rule that is used to protect that amendment, only regulate government action. Budreau v. McDowell, 256 U.S. 465 (1921); Coolidge v. New Hampshire, 402 U.S. 443 (1971). While a trial court should suppress evidence if that action is necessary to deter police misconduct, it cannot extend the Fourth Amendment's reach to private action. As the long list of cases cited above indicates, even if an informant

intentionally lies, a trial court reviewing an affidavit should not, and cannot, take any action against the State unless the police-affiant knowingly or recklessly participated in that lie. In order to convince a court to order the informant's name to be disclosed, a defendant must establish some police misconduct that can only be properly investigated by questioning the informant.

In the case at bar, both the trial court and defense counsel stated that the affiant's credibility was not at issue. Therefore, the only possible reason that could justify a disclosure order vanished. In other words, without an allegation that the State's representative had abridged the defendant's constitutional rights, the Fourth Amendment could not be invoked to

obtain a remedy. But, the trial court nonetheless ordered the prosecution to disclose the informer's name. When the Colorado Supreme Court affirmed that decision, it incorrectly extended the Fourth Amendment beyond State action and into private activity. Obviously, the Fourth Amendment does not go that far.

In this case, the search warrant's affidavit complied with the Aguilar-Spinelli test. By satisfying those conditions, the affidavit provided the reviewing magistrate with probable cause to believe that the defendant possessed heroin. At the suppression hearing the defendant did not satisfy Franks or McCray because he conceded that the affiant's credibility was not at issue. However, even though the State followed each of the rules that this Court has established to govern cases

that involve confidential informants, the Colorado Supreme Court held that the informant's name must nonetheless be revealed. If that disclosure can be obtained on flimsy evidence designed only to impeach a private person, then this Court's carefully crafted rules have been rendered meaningless and the "informer's privilege" has died.

CONCLUSION

In it's decision in this case, the Colorado Supreme Court has effectively emasculated the "informer's privilege." While an accused Fourth Amendment rights should be protected, this Court's decisions in Aguilar, Spinelli, Roviaro, McCray and Franks have established a process with which the State must comply in order to obtain a search warrant. That process not only protects an

accused's privacy by assuring that the police must supply a magistrate with adequate, reliable information before a search warrant is issued, but it also permits an accused to attack that warrant after it has been executed by demonstrating that the government's agents lied or recklessly disregarded the truth. The opinion in this case subverts that process, and the strong public interest behind the "informer's privilege," by permitting an accused, who supplies any evidence at all, to obtain the name of an informant even when the actions of the State's representatives have not been questioned. This Court should issue a writ of certiorari to the Colorado Supreme Court in order to review this decision. Then, in order to stop the erosion of the "informer's privilege" that will harshly and irrevocably cripple

fair and effective law enforcement, this Court should reverse that decision.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF THE
STATE OF COLORADO

Case No. 82SA512

February 22, 1983

THE PEOPLE OF THE STATE OF COLORADO,
Plaintiff-Appellant

vs.

ANTONIO GUADALUPE NUNEZ,
Defendant-Appellee

Interlocutory Appeal from
the District Court of the
County of Adams

Honorable Philip F. Roan, Judge

EN BANC ORDER AFFIRMED

Paul Q. Beacom, District Attorney
Steven L. Bernard, Chief Trial Deputy
Brighton, Colorado

Attorneys for Plaintiff-Appellant

Karp, Goldstein & Stern
Kenneth H. Stern
Denver, Colorado

Attorney for Defendant-Appellee

JUSTICE DUBOFSKY delivered the opinion of the Court.

In this interlocutory appeal under C.A.R. 4.1, the People seek reversal of the Adams County district court's order suppressing evidence seized during a search of the defendant's house. The suppression order was entered following the district attorney's refusal to disclose the identity of one of the confidential informants upon whose statements the affidavit in support of the search warrant was based, in part. We affirm the suppression order.

On November 7, 1981, police sergeant Don DeNovellis executed an affidavit for a search warrant before a Denver district court judge, who issued a warrant authorizing a search of two motor vehicles and a house at 8690 Norwich Street in Denver. The affidavit stated in part:

On 11-7-81 your affiant received information from a previously reliable confidential informant, that the said previously reliable confidential informant was at the location of 8690 Norwich Street in the past 24 hours of that date (11-7-81) and observed Antonio "Pic" Nunez with a large amount of heroin in his possession. This previously reliable confidential informant further related that Mr. Nunez was in the process of cutting (diluting) heroin and was also putting the heroin in balloon packages. Mr. Nunez told the previously confidential informant that he had just returned from Mexico and had purchased five ounces of heroin while he was there, bringing the heroin across the Mexico-United States border himself. This previously reliable confidential informant is knowledgeable in the packaging and appearance of heroin and has admitted to your affiant that said informant has used heroin in the past. This previously reliable C.I. has been reliable on at

> least two occasions within the past 18 months, giving your affiant information involving narcotic activity, and resulting in the recovery of quantity of heroin.

Upon receiving the warrant, narcotics officers searched the house at 8690 Norwich Street and seized 9.6 grams of heroin from the defendant. Nunez was arrested and charged with one count of possiession of heroin, a Schedule I controlled substance, in violation of section 18-18-105, C.R.S. 1973 (1978 Repl. Vol. 8, 1982 Supp.).

The defendant filed motions to suppress and for disclosure of confidential informants. No supporting affidavit accompanied either motion. At the motions hearing, the district court granted the defendant's oral motion to amend the motion to suppress and to present an offer of proof in lieu of the

supporting affidavits required by People v. Dailey, 639 P.2d 1068 (Colo. 1982). The district attorney stated that while he preferred that the affidavits be filed, he would consent to the presentation of the offer of proof in their stead. The court then took testimony on Nunez' veracity challenge to the statements of the confidential informant.[1]

The defendant testified that he had been on a hunting trip from October 31 until November 6, 1981, and that no one but family members had been in his house on November 6, the date that the confidential informant was supposed to have seen him cutting heroin. The defendant also stated that he had not been to Mexico nor told anyone that he had been to Mexico during the week of October 31 to November 6. Sergeant

DeNovellis testified that his informant alleged that he or she had been at Nunez' house on November 6, had seen Nunez with heroin then, and had been told by Nunez about his recent return from Mexico. Given the conflict in testimony, the district court ordered the district attorney to disclose the identity of the confidential informant or face suppression of the evidence seized during the search. When the district attorney refused to divulge the identity of the informant, the court granted the defendant's motion to suppress.[2]

The People argue that the disclosure of confidential informants is limited to situations in which the veracity of the affiant-police officer is successfully attacked. This contention misapprehends the holding of People v. Dailey. Dailey recognized that errors in an affidavit

for a search warrant can result "from the informant's perjury or reckless disregard for the truth, or from the negligence or good faith mistake of either the officer or the informant." 639 P.2d at 1075. When, following a veracity hearing, the probability of one of those kinds of error has been found, the election of remedies or sanctions is left to the discretion of the district court. The necessary foundation for the court's exercise of discretion in ordering disclosure is a showing of a reasonable basis in fact to question the accuracy of the informant's recitals. People v. Martinez, ____ P.2d ____ (Colo. 1983) (No. 82SA294, announced February 7, 1983) slip op. at 5; People v. Bueno, 646 P.2d 931, 935-6 (Colo. 1982).

Our result in this case follows from People v. Martinez, supra.[3] Where the

district court has determined that the defendant has shown a good faith basis in fact to question the accuracy of an affidavit containing recitals based on information supplied by an unnamed informant and consequently has ordered that the informant be disclosed or be produced for an in camera hearing,[4] we will not disturb that ruling. When the People refused to disclose the identity of the informant, the district court properly suppressed the evidence seized during the search of the defendant's house.

The order of the district court is affirmed.

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The defendant limited his challenge to that portion of the affidavit set out in text, supra. He specifically identified as untrue the allegations that a confidential informant had been at his house on November 6, 1981, and that he

had told that person of his recent return from Mexico. The remainder of the affidavit contained the allegations of two other confidential informants, neither of whom specifically attested to having seen the defendant participate in any criminal activity.

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The defendant argues that because suppression was ordered as a sanction for nondisclosure and was merely collateral to the disclosure issue, this court lacks jurisdiction to hear the People's interlocutory appeal under C.A.R. 4.1. A ruling granting a defendant's pre-trial motion to suppress is subject to interlocutory appeal under C.A.R. 4.1. The defendant's contention is controlled by our holding in People v. Dailey, supra, where we determined that an order granting the defendant's motion to disclose a confidential informant was "so intimately related" to the order suppressing evidence that it fell within the interlocutory appeal authorization of C.A.R. 4.1. 639 P.2d at 1076, n. 8.

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We note that here, as in Martinez, the defendant failed to comply with the prerequisites of People v. Dailey for motions and affidavits filed to seek suppression of evidence seized under a challenged search warrant. The People acquiesced in the waiver of those prerequisites at the hearing, however, and do not raise the point on appeal.

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The People did not request an in camera hearing at which the informant would be present for judicial interrogation in accordance with the guidelines in Dailey, supra at 1077, n. 11.

APPENDIX B

IN THE DISTRICT COURT
IN AND FOR THE COUNTY OF ADAMS
AND STATE OF COLORADO

Case No. 81F1429

THE PEOPLE OF THE STATE
OF COLORADO,

vs.

ANTONIO NUNEZ,
Defendant.

MOTION TO SUPPRESS

COMES NOW the defendant, by his attorneys, KARP, GOLDSTEIN & STERN by the undersigned, and moves this Court for an Order suppressing as evidence against the defendant in any criminal proceedings, any and all statements elicited from the defendant by law enforcement officers on the date of and subsequent to defendant's arrest for the crime alleged in the above captioned action, and to suppress any and all physical evidence seized from the person, presence, vehicle and/or premises

of the defendant or visual observations made by law enforcement officers, on or about the time of said arrest and as grounds for this Motion defendant states the following:

1. On or about November 7, 1981, the defendant was arrested by members of the Denver Police Department and Adams County Sheriff's Department.

2. Subsequent to the defendant's arrest, certain physical evidence was seized from the person, presence, or vehicle of the defendant, statements may have been elicited from the defendant by said officer concerning the alleged offense charged in this action and visual observations may have been made by said officers.

3. There was no probable cause to sustain the issuance of a search warrant in the instant case, the search warrant

that was obtained was improperly executed, the defendant was arrested without first procurring an arrest warrant, the evidence seizured was not seized pursuant to a valid arrest nor was said seizure properly incident to or within the scope of a valid arrest and in general, the aforementioned search of the defendant's residence and his arrest took place in violation of state and federal law.

4. At the time of his arrest, statements were elicited from the defendant without the proper advisement and said statements were not voluntarily made by the defendant.

5. Any evidence obtained subsequent to and at the time of the above mentioned arrest were the fruits of an invalid arrest and was obtained under such circumstances that its use in a

trial against this defendant would constitute an illegal search and seizure and would constitute a deprivation of defendant's life and liberty without due process of law, in violation of the Fourth, Fifth and Fourteenth Amendments to the United States Constitution and Article II, Sections 7 and 25 of the Colorado Constitution.

WHEREFORE, defendant requests that this Court enter its Order suppressing as evidence against him the above described evidence and statements and all evidence which is the direct fruit of the above described evidence and statements.

Respectfully submitted,

KARP, GOLDSTEIN & STERN

BY: /s/ Kenneth H. Stern
Attorney for defendant
1760 Lafayette Street
Denver, Colorado 80218
(303) 861-8580

APPENDIX C

IN THE DISTRICT COURT
IN AND FOR THE COUNTY OF ADAMS
AND STATE OF COLORADO

Case No. 81F1429

THE PEOPLE OF THE STATE
OF COLORADO

vs.

ANTONIO NUNEZ,
Defendant.

MOTION FOR DISCLOSURE OF INFORMANT

COMES NOW the defendant by and through his attorneys KARP, GOLDSTEIN & STERN, and moves this Court to Order the law enforcement authorities involved in the instant case to disclose the name, address, and phone number of all informants employed in the instant case and as grounds therefore states the following:

1. In obtaining information which was subsequently used in the search warrant, the law enforcement authorities

involved in the instant case mentioned the presence and involvement of unnamed confidential informants and unnamed citizen witnesses.

2. Both for purposes of challenging the legality of the search in the instant case, as well as defending against the instant charges, the defendant needs disclosure of the names, addresses, and phone numbers, of said informants and citizen witnesses.

3. In the interest of justice, and in order to protect the due process rights of the defendant and his right to a fair trial and the effective assistance of counsel, disclosure of the above described informants and citizen witnesses is absolutely essential.

WHEREFORE, the defendant requests that this Court order disclosure of the

aforementioned informants and citizen witnesses.

Respectfully submitted,

KARP, GOLDSTEIN & STERN

BY: /s/ Kenneth H. Stern
Attorney for defendant
1760 Lafayette Street
Denver, Colorado 80218
(303) 861-8580

APPENDIX D

IN THE DISTRICT COURT
IN AND FOR THE COUNTY OF ADAMS
AND STATE OF COLORADO

Criminal Action No. 82CR0025

THE PEOPLE OF THE STATE
OF COLORADO,

vs.

ANTONIO G. NUNEZ,
Defendant.

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER

The Defendant's MOTION FOR DISCLOSURE OF INFORMANT having come before the Court on September 9, 1982, and the Court having heard testimony and the arguments of counsel and being fully advised in the premises, does make the following Findings of Fact, Conclusions of Law and Order:

1. On November 7, 1981, a member or members of the Denver Police Department prepared an affidavit for

search warrant and based upon said affidavit, obtained a search warrant for 8690 Norwich Street, Adams County, Colorado, and two named vehicles.

2. During the execution of said search warrant, approximately rifteen balloons of heroin were recovered.

3. The affidavit, upon which issuance of the search warrant was predicated, related information from a previously reliable confidential informant that the informant was at the location of 8690 Norwich within the twenty-four hour period from November 6, 1981 to November 7, 1981 and observed Antonio "Pic" Nunez in possession of a large amount of heroin, that Nunez was cutting the heroin, that Nunez was putting the heroin in balloon packages, that Nunez told the informant that he had just returned from Mexico where he had

purchased five ounces of heroin which he brought into the United States.

4. The Defendant filed a motion seeking disclosure of the identity of the informant described in Paragraph 3 above.

5. The Motion for Disclosure is two pronged alleging a need for the purpose of challenging the legality of the search and a need for defending against the substantive charge.

6. At the hearing, the Defendant testified that he had been on a hunting trip for the week proceeding the date of the affidavit and search, having arrived home on November 6, 1981. He also testified he had driven the motor home described in the affidavit on the hunting trip. The defendant further testified that from the time he returned home to the time the search warrant was executed, only immediate family members had been

present in his home and that he had not engaged in the activities described by the confidential informant.

7. The Court finds that as to the legality of the search issue, the Defendant has made the required initial showing pursuant to People v. Bueno, Vol. VI, Brief Times Reporter, p.522 (June, 1982).

8. The Court finds that as to the issue of disclosure on the basis of the informant's being an essential witness on the issue of guilt or innocence, the Defendant has made a showing of a reasonable basis in fact to believe the informant is a likely source of relevant and helpful evidence to the accused.

9. The Court, therefore, orders the District Attorney to disclose the identity of the confidential informant to the Defendant and failing that, the Court

orders suppression of the evidence seized pursuant to the search warrant.

Done and signed in Open Court this 7th day of October, 1982.

BY THE COURT:

/s/ Philip F. Roan
Philip F. Roan
Chief Judge

copies to counsel
10/7/82

APPENDIX E

IN THE DISTRICT COURT
IN AND FOR THE COUNTY OF ADAMS
AND STATE OF COLORADO

Criminal Action No. 82CR0025

THE PEOPLE OF THE STATE
OF COLORADO,

vs.

ANTONIO G. NUNEZ,
Defendant.

ORDER

THE COURT being advised by the District Attorney that the identity of the confidential informant will not be disclosed to the Defendant, the evidence which is the subject of the Defendant's Motion to Suppress is, therefore, suppressed.

Done and signed in Open Court this 12th day of October, 1982.

BY THE COURT:

/s/ PHILIP F. ROAN
Philip F. Roan
Chief Judge

copies to counsel
10/12/82

APPENDIX F

SUPREME COURT, STATE OF COLORADO

Case No. 82SA512

THE PEOPLE OF THE STATE
OF COLORADO,

vs.

ANTONIO GUADALUPE NUNEZ,
Defendant.

MOTION TO RECALL AND TO
STAY REMITTITUR

The plaintiff, by counsel, respectfully requests that this Court recall the remittitur issued in this case and stay the issuance of any remittitur for sixty days. As grounds for this motion, the plaintiff alleges:

1. The interlocutory appeal in this case was filed pursuant to C.A.R. 4.1.

2. This Court affirmed the district court's decision in an opinion issued on February 22, 1983.

3. This Court issued its remittitur on February 22, 1983.

4. The prosecution, by a petition for a writ of certiorari, intends to seek review of this Court's decision in this case in the United States Supreme Court.

5. Pursuant to United States Supreme Court Rule 20, the prosecution must file its petition for a writ of certiorari within sixty days of this Court's final decision, or by April 23, 1983.

6. This Court should recall the remittitur issued on February 22, 1983, and stay the issuance of any remittitur until April 23, 1983, so that the prosecution can seek review in the United States Supreme Court of this Court's decision in this case.

WHEREFORE, the plaintiff respectfully requests that this Court

recall the remittitur previously issued in this case and stay the issuance of any remittitur until April 23, 1983.

Respectfully submitted,

PAUL Q. BEACOM,
District Attorney
Seventeenth Judicial District

By: /s/ Steven L. Bernard
Steven L. Bernard, #8897
Chief Trial Deputy
450 South Fourth Avenue
Brighton, CO 80601
(303) 659-7720

APPENDIX G

SUPREME COURT, STATE OF COLORADO

Case No. 82SA512

INTERLOCUTORY APPEAL FROM THE
DISTRICT COURT, ADAMS COUNTY

THE PEOPLE OF THE STATE
OF COLORADO,

vs.

ANTONIO GUADALUPE NUNEZ,
Defendant.

ORDER OF COURT

Upon consideration of the Motion to Recall and to Stay Remittitur filed by counsel for Plaintiff-Appellant herein, and now being sufficiently advised in the premises,

It Is This Day Ordered that said Motion shall be, and the same hereby is, Denied.

BY THE COURT, FEBRUARY 28, 1983.

cc: Steven L. Bernard
Chief Trial Deputy
450 South Fourth Avenue
Brighton, CO 80601

Kenneth H. Stern
KARP, GOLDSTEIN & STERN
1763 Franklin Street
Denver, CO 80218

APPENDIX H

IN THE DISTRICT COURT
IN AND FOR THE COUNTY OF ADAMS
AND STATE OF COLORADO

Case No. 82CR0025

THE PEOPLE OF THE STATE
OF COLORADO,

vs.

ANTONIO G. NUNEZ,
Defendant.

MOTION TO STAY PROCEEDINGS

The Plaintiff, by counsel, respectfully requests that this Court stay all proceedings in this case pending further appellate review.

AND AS GROUNDS THEREFORE STATES:

1. The plaintiff is charged with Possession of Schedule I Controlled Substance contrary to C.R.S. 1973, §12-22-309, as amended and C.R.S. 1973, §18-18-105(2)(a), as amended.

2. On October 7, 1982, this Court ordered the prosecution to reveal a confidential informant.

3. Pursuant to C.A.R. 4.1, the prosecution filed an interlocutory appeal in the Colorado Supreme Court to seek review of the Court's decision.

4. On February 22, 1983, the Colorado Supreme Court affirmed this Court's decision in People v. Nunez, 82SA512. The Supreme Court issued its remittitur on that same day.

5. On February 25, 1983, the prosecution filed in the Colorado Supreme Court a Motion to Recall and to Stay Remittitur. The prosecution requested that action because it intends to petition the United States Supreme Court for a writ of certiorari in order to review the Colorado Supreme Court's decision.

a. The Colorado Supreme Court denied that request.

6. The prosecution still intends to petition the United States Supreme Court for a writ of certiorari in this case. Pursuant to United States Supreme Court Rule 20, this petition must be filed within sixty days of the Colorado Supreme Court's decision, or by April 23, 1983.

7. Therefore, this Court should stay further proceedings in this case so that the prosecution can obtain appropriate review of the Colorado Supreme Court's decision.

8. Because a petition for a writ of certiorari to the United States Supreme Court is the only process that the prosecution can use to obtain review of the Colorado Supreme Court's decision in this case, it is the prosecution's

position that the time taken to petition for that writ should be excluded from speedy trial calculations.

WHEREFORE, the plaintiff respectfully requests that this Court stay any further proceedings in this case until the United States Supreme Court has decided whether to issue a writ of certiorari to the Colorado Supreme Court.

Respectfully submitted,

PAUL Q. BEACOM
District Attorney
Seventeenth Judicial District

By: /s/ Steven L. Bernard
Steven L. Bernard, #8897
Chief Trial Deputy

ORDER

The Court, having read this motion and being informed of the surrounding circumstances, stays all further proceedings in this case until the United States Supreme Court has decided whether

to issue a writ of certiorari to the Colorado Supreme Court.

DONE THIS 9th day of March, 1983.

/s/ Philip F. Roan
DISTRICT COURT JUDGE

APPENDIX I

Rule 4.1. Interlocutory Appeals In Criminal Cases

* * * *

(g) Disposition of Cause. No oral argument shall be permitted except when ordered by the court. The decision of the court shall be by written opinion, copies of which shall be transmitted by the clerk of the court by mail to the trial judge and to one attorney on each side of the case. No petition for rehearing shall be permitted. Remittitur shall accompany said opinion.